89-1866

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1989

- - - - - - - - - - - - -

ARDEN BRETT BULLOCK,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

- - - - - - - - - - - - -

PETITION FOR WRIT OF CERTIORARI TO THE UTAH STATE SUPREME COURT

- - - - - - - - - - - - -

CRAIG S. COOK
(Counsel of Record)
3645 East 3100 South
Salt Lake City, Utah 84109
(801) 485-8123

QUESTIONS PRESENTED FOR REVIEW

1. Does the deliberate refusal by a child abuse specialist investigating the case on behalf of the state to record interviews with allegedly abused children while utilizing unprofessional interviewing techniques during the investigation process together with a group meeting of the children, parents, therapist, police and county attorneys for the purpose of stabilizing the children's testimony violate Fifth and Fourteenth Amendment rights to pretrial Due Process and constitute bad faith under Arizona v. Youngblood?

2. Was petitioner denied the right of confrontation guaranteed by the Sixth Amendment when the lower court allowed an avalanche of unreliable, tainted hearsay testimony of children when such testimony did not have any particularized guarantee of trustworthiness?

3. Was Petitioner denied face-to-face confrontation with the accusing children in direct violation of his Sixth Amendment Confrontation right when he was excluded from their presence during video tape testimony and where no showing of substantial emotional or physical harm to the children was made?

4. Did the Utah Supreme Court err in refusing to review Petitioner's constitutional claims based upon waiver of counsel when the decision incorrectly applied the standards for ineffective counsel as proclaimed by this Court in Strickland v. Washington, and Kimmelman v. Morrison. Did the Utah Supreme Court err when it concluded, without any evidentiary basis, that Petitioner's trial attorney had strategically decided not to object, either before or during trial, to: (1) the

testimony of a child therapist who violated all professional standards of interviewing techniques with children including the failure to record in any way the interview sessions; (2) the unreliable hearsay and cumulative testimony of parents and police officers as to what the children had told them even though the children themselves testified; (3) the testmony of the children who had been subjected to highly improper interviewing techniques, group sessions of testimony recall, and admitted pressures from their parents to accuse Petitioner of abuse; and (4) the opinion of the state expert witnesses as to the truthfulness of the children and their likelihood of having been abused?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Court Rules

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

Petitioner, Arden Brett Bullock, respectfully petitions this Court for a Writ of Certiorari to review the judgment and opinion of the Utah Supreme Court in this case.

CITATION OF OPINIONS

The decision of the Utah Supreme Court rendered on October 18, 1989 is reported at 119 Utah Adv. Rep. 33. It is contained in a separate appendix to this Petition. The opinion regarding petitioner's request for rehearing is printed at 123 Utah Adv. Rep. 6. It is contained in the appendix contained in this Petition.

JURISDICTIONAL GROUNDS

1. The decision of the Utah Supreme Court was rendered on October 18, 1989.

2. The decision of the Utah Supreme Court denying Petitioner's Request for Rehearing was rendered on November 20, 1989 with a published opinion of Justice

Stewart, dissenting, jointed by Justice Howe written on December 4, 1989.

3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional and statutory provisions are relevant to this Petition. As provided for in Rule 14.1(f) the text of these provisions will be provided in the appendix contained in this petition. The following provisions are applicable:

1. Amendment 5 to the United States Constitution.

2. Amendment 6 to the United States Constitution.

3. Article I, Section 7, Utah State Constitution.

4. Article I, Section 12, Utah State Constitution.

5. Section 76-5-410, U.C.A.

6. Section 76-5-411, U.C.A.

7. Section 77-35-15.5, U.C.A.

8. Rule 403, Utah Rules of Evidence.

STATEMENT OF THE CASE

Justice I. Daniel Stewart in his scathing dissent to the three-two majority opinion wrote the following:

> The defendant was tried and convicted on an avalanche of hearsay. Not once was he ever allowed to confront his primary accusers face-to-face, nor was he able to cross-examine them at trial because their testimony was presented by video tapes made two months before trial. The accusations were also presented at trial through the testimony of a social worker and a psychologist who repeatedly interrogated the four young complainants and then acted as conduits for the admission of more of the boys' hearsay evidence.
>
> * * *
>
> A legitimate public concern for the problems of child sex abuse must not be converted into a hysteria that overruns and tramples the rights of those who are accused. The Salem witch trials are not just an artifact of another era and another century; they say something about human nature that may well have been repeated in the notorious Scott County sex abuse case in Minnesota and the infamous McMartin Preschool case in Manhattan Beach, California,

> where numerous sordid reports of child sex abuse turned out to be false. 119 Utah Adv. Rep. at 37-38.

The facts of this case graphically illustrate the concerns voiced by Justice Stewart. A review of the facts of this case shows an unbelievable sequence of events involving the trampling of Petitioner's right to receive a fair trial. In fact, it is difficult to conceive of a case in which a more ruthless violation of guaranteed constitutional rights could occur. The following is a brief synopsis of the underlying facts and procedures which give rise to the present Petition.

The Petitioner, age 36 at time of trial, was a licensed architect. He had no criminal record and had never been accused of child sexual abuse prior to the charges for which he was convicted in this case. He was a respected community member who lived in Bountiful, Utah with his wife and four children. In 1984 serious

differences arose between Petitioner and his wife. He subsequently moved out of the family residence and in May, 1984, a divorce was obtained. He remarried in September, 1985. In September, 1985, the judge in the divorce case ordered a custody evaluation to be made of Petitioner, his ex-wife, his new wife, and his children. Dr. Monica Christy, a licensed psychologist and specialist in child problems was retained to perform these evaluations.

In late June or early July 1985, one of Petitioner's former neighbors took her four-year-old son Mason to be interviewed by Dr. Barbara Snow, the clinical director of the Intermountain Sexual Abuse Treatment Center (ISAT) (Tr. Vol. 2, p. 33). The neighbor took her son to ISAT on the recommendation of another neighbor, Mariam Smith, who was the Center director. The mother was concerned about Mason's sexual remarks made to a four-year-old

neighbor girl and his four-year-old boy cousin. (Tr. Vol. 2, p. 32).

Dr. Snow, who has a Ph.D. in social work and is a self-acknowledged child abuse specialist, saw the four-year-old boy on several occasions. Mason reported that he had been sexually molested by two neighborhood boys, Spencer and Jeremy. Jeremy was the eight-year-old son of Petitioner. Mason's mother visited Spencer's parents that night and reported the accusation. She later telephoned Petitioner, who no longer lived in the neighborhood, and reported the accusation to him. (Tr. Vol. 2, p. 35).

Petitioner testified that when he learned from Mason's mother that Mason had accused Jeremy of sexual acts, he contacted his ex-wife who had custody of the children and urged her to make arrangements to take the children for counseling. Mason's mother had recommended taking them to ISAT and

Petitioner passed this advice on to his ex-wife offering to pay for the treatment. (Tr. Vol. 6, p. 17).

Upon learning of the accusation against their son, Spencer's parents contacted Dr. Snow and arranged for her to interview Spencer. Dr. Snow first interviewed Spencer, who was then eight years old, on September 18, 1985. Dr. Snow from testified that Spencer admitted he and Jeremy had done a "bad touch" to the four-year-old boy. (Tr. Vol. 2, p. 101). A second interview with Spencer occurred a week later on September 25, 1985 at which time, according to Dr. Snow, Spencer described sexual play among Sudi (Petitioner's then twelve-year-old daughter), Jeremy, and himself. Dr. Snow testified she asked him how he knew what to do and he then accused "Brett", the petitioner, of telling him how and also showing him. (Tr. Vol. 2, p. 112).

The next time Dr. Snow interviewed

Spencer was a week later. On this occasion he described an incident involving himself, Petitioner, his friend Jeremy, and two other friends, Ryan and Brooks. Dr. Snow testified that she immediately called the Bountiful Police Department to inform them of the allegations against an adult. (Tr. Vol. 2, p. 118). At the same time she notified Mariam Smith of her interviews with Spencer. Dr. Snow then contacted the parents of the other two boys who had been mentioned by Spencer. (Tr. Vol. 2, p.129).

During this period of time Petitioner's estranged wife Yvonne was in contact with Dr. Snow concerning the allegations. She took Sudi to be interviewed by Dr. Snow at the ISAT Clinic on September 30, 1985. Sudi adamantly denied any sexual activity with her father or with any of the other boys. (Tr. Vol. 5, pp. 120-22). On October 8, 1985 Yvonne contacted Dr. Monica Christy and

informed her that Dr. Snow stated Spencer had accused Petitioner of improperly touching him. The former wife related that Snow believed that the Bullock children were "covering up" and that they would not talk about being molested by Petitioner. Yvonne told Dr. Christy that Brett would soon be charged with a felony. (Tr. Vol. 5, p. 137).

The next day Dr. Christy went to see Dr. Snow. Dr. Christy told her that she needed to know what was happening because she did not want to continue the custody evaluation until she was aware of all the circumstances. Dr. Christy took notes of her conversation with Dr. Snow. According to Dr. Christy, the initial version of the story told to her by Dr. Snow differed remarkably from what ultimately was told by the children in their video tapes at trial. (Tr. Vol. 5, p. 140). Dr. Christy acknowledged to Dr. Snow that this type of abuse information would have a

serious effect upon the outcome of the custody evaluation. For this reason she recommended that Dr. Snow start video taping or at least audio taping the interviews so that she could verify what was happening with the children. Dr. Snow refused to follow this request. (Id. at 143).

Likewise, police detective Diana Stevens of the Bountiful City Police testified that after she was contacted by Dr. Snow regarding the claim of abuse she worked closely with Dr. Snow and elected to have Dr. Snow continue her interviews with the children. However, Dr. Snow refused her numerous requests for written reports of the interviews as well as her request that the interviews be video taped. Detective Stevens stated that she wanted this information to make sure that all of Petitioner's rights were being protected during the investigation and that questions were not being asked

improperly. (Tr. Vol. 4, p. 30). Detective Stevens also admitted that because of Dr. Snow's conversations with the parents as well as with Mariam Smith she had lost control over the flow of information. (Tr. Vol. 4, p. 41).

Throughout October and November Dr. Snow continued to interview the children. As to Spencer several more sessions occurred and on October 24, 1985 a video tape was made of the interview. This was the only video tape made of any of the interviews of the children. As to Ryan she interviewed him twice in October, twice in November and once in December. Ryan essentially denied that anything had occurred. As to Brooks, Dr. Snow interviewed him on December 4 and December 10. According to Dr. Snow during the second interview he admitted that he had been abused by the petitioner. (Tr. Vol. 2, pp. 135-37). Several other neighborhood children were also being

interviewed by Dr. Snow during this period of time. These interviews resulted in additional charges being brought against Petitioner but were later withdrawn after the children recanted the accusations. Dr. Snow during all of these interviews with the children took no notes and made no recordings either audio or visual of the sessions.

Dr. Snow conducted the interviews of the various children in her private office or the "Playroom" at ISAT. She acknowledged that ISAT received the bulk of its finances from the Utah State Division of Family Services and that the clinic had a contract with the State to treat sexual abuse victims and their families. Dr. Snow described herself as a biased child advocate who is not concerned with the outcome of the case against an accused but only concerned with representing the child's interest. (Tr. Vol. 2, p. 73). She admitted that she

had a very aggressive questioning technique (Tr. Vol. 2, p. 83) and that she would often ask the same question over and over again in different forms to obtain an answer. (Tr. Vol. 2, p. 85). She further testified that anyone questioning her evaluation of children had to do so solely upon her memory. In a dialogue with defense counsel the following exchange occurred:

Q. So my question is how does someone judge your judgment and review your version of what a child has told you?

A. Only on my report of what occurred.

Q. And your report of what occurred is kept in your head?

A. Based on memory.

Q. Not on any written findings?

A. Its my training and expertise to try and grasp mentally all kinds of things. Not just what a child says, but all the kinds of moods that change in a room and those that are difficult to record.

Q. So other than your recollection and statement of what happened, that is the only basis one would

have to review what you say happened and review your conclusion or what you base your conclusion on?

A. That's true. It's my own integrity is all you would have. (Tr. Vol. 2, p. 201).

On December 13, 1985, a meeting was held at the County Attorney's Office with three of the children, their parents, Dr. Snow, several police officers and two county attorneys. Dr. Snow began the meeting by interviewing each of the children in the presence of the others. Each of the children recounted their version of the incidents. One of the children, Ryan, however, stated he could not remember any of the things which the other boys were stating. (Vol. 3, pp. 118-123).

By this time the prosecutors were focusing upon two incidents which allegedly occurred a year or two before the first Snow interview. Each supposed incident involved the presence of the other children, Jeremy Bullock, and

another boy named Terry. At one of the incidents Petitioner's daughter Sudi was supposedly involved.

During the early months of 1986, months after the children had been first questioned by Dr. Snow, the children were referred by the County Attorney to Dr. Ann Tyler, an expert in clinical assessment of abused children. Dr. Tyler stated that all of her interviews with the children were recorded by video tape and that she found it to be no problem to use a camera with the children in obtaining truthful and accurate statements. She stated that it was necessary for her to constantly review her written notes and video tapes in order to evaluate interviews in the past. (Tr. Vol. 4, pp. 148-49). She testified that it was important to keep the children uncontaminated by not allowing them to compare stories or to talk with adults. (Tr. Vol. 4, pp. 177-78). Dr. Tyler stated she was unaware

of the extensive involvement of the parents with their children in comparing stories of each child (Tr. Vol. 4, p. 191) and that she suggested such involvement was not psychologically appropriate if its purpose was to elicit information from the children. (Tr. Vol. 4, p. 19). She also disapproved of the meeting with the children in the County Attorney's Office.

Dr. Tyler related several of her interviews with the children. In one interview Ryan told her that his friends and relatives said that the abuse had happened and although he couldn't remember it happening it must have happened. (Tr. Vol. 4, p. 186). He also told Dr. Tyler that his father told him at the County Attorney meeting he could "either be on Brooks' team or on Brett's team." (Tr. Vol. 4, p. 190). He said "my Dad's on their side so I have been trying to think so hard that it did happen but I just

can't remember." Id. at 190-191. He admitted on another occasion that he told his father that abuse had occurred at a birthday party because his father "kept bugging him" until he "finally just lied." Dr. Tyler stated that this type of pressure by Ryan's father would be considered undue pressure in her estimation. Id. at 192-193.

The dissenting opinion written by Justice Stewart extensively quotes from other testimony elicited at trial which is "replete with instances of the use of coercion, threats, pressure and suggestions by both Dr. Snow and several parents in persuading the boys to adopt the story that convicted the defendant." 119 Utah Adv. Rep. at 41.

In October of 1986 Petitioner's trial counsel filed a motion in limine to restrict any expert witnesses from testifying as to their opinion of the credibility or believability of any

statement of an alleged victim or other person. (Record 142-143). On October 7, 1986 a pretrial was held in the lower court. At this time the lower court informed the assistant Davis County Attorney of the existence of a recent Utah Supreme Court decision entitled State v. Nelson, 725 P.2d 1353 (Utah 1986), which had just been decided. The Court informed the County Attorney that he would have to meet the foundational requirements of that case in order to produce hearsay evidence of the chidren. (Tr. of Oct. 7, 1986, pp. 15-20). At the same time the lower court ruled that the expert witnesses would not be allowed to testify that the children were telling the truth or that they had been abused. They could, however, testify that the characteristics of the children were consistent with child abuse. Id. at 34.

On October 16 Petitioner filed a motion requesting that he be allowed to be

present during the recording of the children's testimony "unless the court makes a determination excluding the defendant as required by 77-35-15, U.C.A." A hearing was held in the district court. Dr. Tyler testified that in her opinion if the petitioner was to be in the children's presence during their testimony they would suffer psychological stress. (Oct. 16 hearing, pp. 12-20).

At the conclusion of the testimony petitioner's counsel stated to the court:

> . . . that "to the extent of the statute allowing the exclusion of the defendant from the room when the testimony is being taken, it's unconstitutional and it violates his right to confront his witnesses as provided by both the state and federal Constitution." Id. at 20.

The court thereafter entered findings that testifying in the presence of the petitioner would cause each child serious emotional or mental strain. Id. at 20-24.

On this same day, October 16, 1986, Ryan Smith, Terry Rose, Spencer Brundage,

and Brooks Bahr all testified pursuant to the statutory videotaping procedure. The judge, Dr. Tyler, and the two attorneys together with a camera operator were present in the courtroom. Petitioner viewed the proceeding through a television monitor and was able to telephonically communicate with his attorney. The video depositions were relatively short with few questions being asked by Petitioner's counsel.

On November 25, 1986 another pretrial hearing was held where the county attorney was again told by the lower court to be aware of the Nelson case and its requirements for hearsay statements. The county attorney suggested that a hearing be held prior to trial "to establish the foundation and all of those, if it looks like we are going to have a lot of that." (Tr. Nov. 25, 1986, p. 65). The court stated that a pretrial hearing was not necessary but that the county attorney

should keep in mind that the law was clear, the court had to make findings and conclusions on each of the statements for hearsay evidence to be introduced. (Id. at 66). Petitioner's lower court counsel was silent as to the county attorney's suggestion for a pretrial reliability hearing.

The trial commenced on December 6, 1986. Petitioner was tried on nine separate counts alleging aggravated sexual abuse of a child and sodomy of a child. The prosecution theory was that there were two separate incidents involving Spencer, Brooks, Ryan, Jeremy, Sudi, and another boy named Terry. (Record pp. 282-86).

A hearing was held outside of the presence of the jury as to the children's hearsay statements to be offered by the parents. Spencer's parents, Ryan's parents and Brooks' parents testified to conversations with their children. Defense counsel made only minor procedural

objections to this testimony. The lower court ruled that the vast majority of all of this testimony was admissible. (Vol. I, Dec. 10, 1986, pp. 154-239).

The question then arose as to the allowance of the children's hearsay statements through Dr. Snow and Dr. Tyler. Petitioner's trial counsel made the following statement to the court:

> My understanding is that Barbara Snow and Dr. Tyler are going to testify to various things the kids told them and use that as a basis of getting their opinion as to whether or not these children have been sexually abused. I don't see any objection that I have to that, those statements coming in okay, because they can come in as the basis for the court, for the experts giving their opinion. (Id. pp. 247-248).

He later stated:

> I don't see any need to call these experts to establish their reliability. (Id. at 249).

On December 11, 1986, the second day of trial, the lower court observed the one video tape interview of Dr. Snow which was conducted on October 23, 1985. No

objections or comments were made by Petitioner's counsel as to her technique. The court then stated that it would enter findings pursuant to Section 74-5-411, U.C.A. as to allowing Dr. Snow to testify as to the children's hearsay statements. Again, defense counsel made no comments or objections to these findings. No effort was made by defense counsel to inform the court as to the serious irregularities utilized by Dr. Snow in her interviewing techniques, record keeping and philosophies.

The state presented a smorgasbord of evidence. First, it presented the testimony of Barbara Snow who basically recounted in detail each of the interviews with the children as to what they had said and done. For the remainder of the trial each of the three children testified by way of the video deposition. Before each deposition and after each deposition a parent of the child would testify as to

their observation of the child's actions and statements. Police officers testified as to their involvement in the case including the group meeting at the county attorney's office. Finally, Dr. Ann Tyler extensively testified as to the interviews she conducted and the statements made by the children to her. The state offered no physical evidence to substantiate the claims of the children and therapists.

Even though the court had previously ruled that expert testimony regarding truthfulness and opinions of abuse was inadmissible both Dr. Snow and Dr. Tyler gave opinions in these areas without objection from Petitioner's defense attorney. (Tr. Vol. 2, pp. 184-88; Vol. 4, pp. 61-72). For example, in response to the question: Do you have an opinion whether Brooks was abused?, Dr. Tyler was allowed to answer without objection, "It is the opinion of this examiner that Brooks has been sexually

abused and he is fearful that something bad might happen to him or someone else unless the perpetrator is put in jail." (Tr. Vol. 4, p. 119). She was also allowed to testify without objection that she thought Ryan had been a victim of child sexual abuse. (Tr. Vol. 4, p. 38).

Petitioner's case included the testimony of his daughter, Sudi, who testified that she had never been abused by her father nor had she ever engaged in improper conduct with the boys. Petitioner testified that he had never sexually abused his children or anyone else's children. Three expert witnesses testified as to the complete lack of professionalism of Dr. Snow in her procedures and of the dangers that she created by shaping testimony of the children. All of the experts found Dr. Snow's techniques to be completely unreliable since she did not (1) keep any

written records or tapes of her interviews with the children; (2) she did not interview the children impartially but did so with the intention of finding abuse; (3) she asked questions very aggressively and actually changed the childrens' testimony by reinforcement and punishment; (4) she contaminated the testimony by allowing group sessions of the children and by discussing the children's statements with their parents.

The defense experts also testified that because of the conduct of the investigation in this case it was virtually impossible to unravel the truth as to what had actually occurred to the children. They all agreed that once a young child has been contaminated in this manner it is highly improbable to ascertain whether a described event actually happened or whether the child has been made to believe it happened by repetitive questioning and other

suggestive techniques.

Defendant was found guilty by the jury of three counts of aggravated sexual abuse of a child and three counts of charges of sodomy upon a child. He was acquitted of charges related to Terry (the fourth child) and two charges of sodomy and aggravated sexual abuse with his daughter Sudi. The court sentenced Petitioner to a minimum mandatory term of 15 years to life on each sodomy count and 9 years to life on each sexual abuse count with the prison terms to be served concurrently.

On appeal, the Utah Supreme Court affirmed the conviction. The majority opinion essentially stated that the errors claimed on appeal had not been properly preserved in that Petitioner's trial counsel specifically failed to object or actually stipulated to the claimed procedural and substantive errors. In a vigorous dissent Justices Stewart and Howe

contended that the matters raised on appeal had either been preserved below in pretrial motions or, in the alternative, that Petitioner's trial counsel was ineffective under this Court's criteria in Strickland. The dissent concluded that Petitioner was convicted by an "avalanche of hearsay testimony" and that Petitioner was denied various constitutional rights by the conduct of the trial. The voluminous decision of the Court is contained in a separate appendix to this Petition.

Subsequently, Petitioner requested a rehearing be granted. The request was again denied 3-2. Justice Stewart in an unusual Utah procedure, together with Justice Howe wrote a dissenting opinion to the denial of the Petition for Rehearing. This opinion entered on December 4, 1989 is contained herein as part of this Petition's attached appendix.

It is from these decisions that the

present Petition to this Court is taken.

At the present time, Petitioner is in the State Prison serving the mandatory minimum term of fifteen years to life, because according to the opinion of the Supreme Court of Utah, his trial counsel consciously chose to disregard the plain and manifest errors which occurred at and before trial.

REASONS FOR GRANTING THE WRIT

"Child abuse is a problem of disturbing proportions in today's society." Coy v. Iowa, 487 U.S. ___, 101 L.Ed.2d 857, 868, 108 S.Ct. 2798, 2803 (1988). In response to public outcry over child sexual abuse, the legislatures of at least twenty states, including Utah, have passed legislation designed to minimize the trauma to child victim witnesses and to facilitate the prosecution of alleged child sexual abusers by relaxing evidentiary standards. This effort has created conflict between important social

issues: the need to convict child sexual abusers and protect vulnerable children vs. the need to protect the constitutional rights of an accused.

Numerous cases are decided daily throughout the country involving questions of child abuse and constitutional safeguards. This Court has recently accepted two cases for review; one from Idaho, Idaho v. Wright, No. 89-260 and one from Maryland, Maryland v. Craig, No. 89-478. The Idaho case poses the question of what the Sixth Amendment Confrontation Clause requires in allowing hearsay statements of a young victim of sexual abuse to be admitted into evidence. The Maryland case focuses upon the Sixth Amendment Confrontation Clause and how it relates to face-to-face meetings with young children utilizing closed circuit television procedures.

The instant case encompasses the issues of the Idaho and Maryland cases but

also includes other equally important claims that have not yet been determined by this Court. In summary, this case presents the following constitutional questions: (1) does the state violate a defendant's right to due process by (a) relying on a child abuse specialist to investigate the accusations against a defendant by techniques which are inherently likely to distort and influence the statements of young children while at the same time failing to make a record in any way of these interviews contrary to all professional standards; (b) allowing the county attorney and the police to conduct a group session with the children for the purpose of unifying and reinforcing the children's testimony; (2) is Due Process and Confrontation violated by allowing "an avalanche of hearsay" testimony as to what the children had allegedly told two therapists, two police officers, and all of the parents without

showing that such statements are inherently reliable especially in light of the highly prejudicial and unprofessional conduct of the investigation prior to trial; (3) is a defendant's right to confrontation violated when children are allowed to testify by video tape outside of the physical presence of the defendant without any showing of a substantial harmful effect upon the children; (4) did the Utah Supreme Court err in refusing to review the preceding constitutional claims of Petitioner based upon pure speculation that Petitioner's attorney had strategically elected to waive all objections?

The actions of the state and their affirmance by the Utah Supreme Court are in direct conflict with decisions of this Court and with fundamental principles of constitutional law. These issues will now be discussed in serium.

I. THE DECISION OF THE UTAH SUPREME COURT IS IN CONFLICT

WITH THIS COURT'S PREVIOUS DECISIONS INCLUDING ARIZONA V. YOUNGBLOOD AS TO A DEFENDANT'S FUNDAMENTAL DUE PROCESS RIGHTS IN THE GATHERING AND PRESERVING OF EVIDENCE.

The majority opinion of the Utah Supreme Court stated the claim raised by Defendant on appeal as to his denial of fundamental due process. The majority opinion stated:

> Defendant contends that he was denied due process because the initial interviews of the child victims conducted by Dr. Snow so contaminated the investigative process through suggestive questioning and inadequate recording practices that the evidence of sexual abuse that surfaced during her interviews and the subsequent interviews of the victims by other persons, including their parents, rendered all of the evidence inadmissible. 119 Utah Adv. Rep. at 35.

The majority refused to examine this contention on the basis that Defendant's attorney had strategically waived any challenge thereby precluding review. The dissenting opinion, on the other hand, claimed that review was warranted either

because (1) the failure to object demonstrated ineffective counsel which thereby permitted examination of the due process claim or (2) the conduct of the state rose to the level of manifest error allowing review. In discussing Petitioner's claim of due process violations with the manifest error doctrine the dissenting opinion stated:

> Indeed, this is a compelling case for invoking that doctrine precisely because the majority itself recognizes that what is at stake here is whether the techniques that were used in the interrogation of the child accusers and preparation of their testimony for trial had the effect of "brainwashing" the boys. The majority does not even address that point; but if it has merit, as I believe it has, then this trial was in fact fatally affected with fundamental unfairness and cannot stand constitutionally. See generally Colombe v. Connecticutt, 367 U.S. 568 (1961); Rogers v. Richmond, 365 U.S. 534 (1961); Haley v. Ohio, 332 U.S. 596 (1948); Malinski v. New York, 324 U.S. 401 (1945); Chambers v. Florida, 309 U.S. 227 (1940). See also Hurst v. Cook, 777 P.2d 1029 (Utah 1989); Chest v. Smith, 617 P.2d 341 (Utah 1980). 119 Utah

Adv. Rep. at 38.

As will be discussed in Part IV of this Petition the Utah Supreme Court should have decided the issue of the due process claim raised by Petitioner. He claimed on appeal that constitutional due process requires "fundamental fairness" Lisenba v. California, 314 U.S. 219 (1941), which demands that the state in gathering evidence against an accused must do so in a manner which is free from contamination and manipulation and must exercise good faith to preserve such evidence for the review of the accused.

This Court's decision in Arizona v. Youngblood, 109 S.Ct. 333 (1988) was decided some six months after the instant case had been argued to the Utah Supreme Court. Nevertheless, the same principles and cases relied upon in Youngblood were briefed by Petitioner. The Utah Supreme Court by relying entirely upon waiver of counsel refused to address the due process

argument advanced below. Had it done so it would have had to conclude that the Youngblood criteria of preservation of evidence had not been followed in this case. The Youngblood requirement of "bad faith" is certainly evident from the facts of this case in that the actions of the state not only give rise to a claim of improper preservation of evidence but also active affirmative manipulation and distortion of evidence.

The Youngblood standard must be examined in the context of this case. Here, the petitioner had an umblemished record and was an outstanding member of the community. At the time of this investigation he was embroiled in a bitter custody battle with his former wife. Upon learning that his son was accused of molesting a younger boy he immediately consented to sending his children to Dr. Snow for evaluation. The children were interviewed by Dr. Snow in a context in

which some of them were being accused of molesting younger children. None of these children had previously reported any improper conduct by Petitioner to their parents or other adults in the one to two years prior to the investigation. No mention of abuse occurred until each child had been secretly interviewed by Dr. Snow.

In addition, the instant case involved no physical evidence of abuse. There were no medical reports, photographs, laboratory tests or any other scientific or medical confirmation that the claimed acts actually occurred. The evidence consisted entirely of credibility of witnesses. The jury had to choose whether to believe the children, Dr. Snow and Dr. Tyler, and the parents of the children or to believe the petitioner, his daughter, and the expert witnesses relied upon by him.

These factors distinguish the instant case from those instances in which

evidence of abuse is overwhelming and where improper investigatory techniques would have little or no effect upon the outcome of the result. Here, any effort by the state or its agents to manipulate or distort the credibility of any of the witnesses had a substantial and overwhelming effect on the outcome of the trial.

Petitioner claimed that the actions of Dr. Snow together with the actions of the county attorneys' office comprised the conduct which violated his right to procedural due process prior to trial. At trial Petitioner produced undisputed expert witnesses who testified in detail that the common notion among lay people that "children always tell the truth" is not accurate. In addition, on appeal, Petitioner produced hundreds of pages of documented studies discussing this critical issue. (A brief summary is contained in the Appendix). Essentially,

these experts and studies show that while children may not intentionally lie or intend to deceive, they are extremely susceptible to shaping of their testimony and that interviewers must be extremely careful in the manner in which interviews are conducted with young children.

One authority explains this principle as follows:

> In each exposure to interrogation the child learns more about what the interrogator expects. The child learns what adults, including parents, want and expect from the child. The child learns what to say or to do that will get a reinforcing response from the interrogator. The child learns what attitude is expected toward the alleged abuser. The child learns the victim role. The child learns the tale and, by repetition, may come to and experience subjective reality that it happened, even when it never did happen. "The Role of the Psychologist in the Assessment of Cases of Alleged Sexual Abuse of Children," Institution for Psychological Therapy, p. 28 (1986).

In addition, the experts are universal in proclaiming that the first interviews with

children are extremely critical and that it is necessary to record in minute detail both the questions of the interviewer and the answers and expressions of the child. Even the state's other expert witness, Dr. Ann Tyler, acknowledged this essential recording of children's interviews.

Petitioner argued that the investigation in this case flagrantly violated his right to procedural due process protection. First, after notification of the alleged abuse in the neighborhood the Bountiful City Police delegated the entire initial investigative process to Dr. Barbara Snow. Dr. Snow has always maintained throughout her practice that she is a child advocate who is biased for the child and is not an impartial fact collector like the police. She has never claimed it is her function to have an open mind in determining child abuse cases. She is essentially always looking for signs of sexual abuse in children. (Tr.

Vol. 2, p. 198). It is therefore incredible that a person such as Dr. Snow should be allowed to conduct the initial critical interviews with the children to determine whether any improper activities had occurred.

Second, the Bountiful Police officers testified that Dr. Snow adamantly refused to record any of the interviews even though they requested her to do so. The officers testified that they were aware of the importance of recording these initial interviews for the protection of the petitioner's rights as well as the state's case. (Tr. Vol. 4, pp. 20-30). Nevertheless, even in the face of these refusals the police and county attorney allowed her to continue the investigative process.

Third, the police quickly learned that Dr. Snow was giving information to various parents concerning interviews she was having with other children and that

she was also informing Mariam Smith in the neighborhood of each development. This contamination of the parents with each other's children violated the professional code of ethics of social workers and psychologists and even the police officers admitted that they had lost complete control of the flow of information. (Tr. Vol. 4, pp. 27, 40).

Fourth, Dr. Snow reluctantly made one video tape of a child on October 23 at the Salt Lake County Attorney's Office. She had previously interviewed him on four occasions with no notes or records. A review of that tape by the police or county attorney would have shown that Dr. Snow's questioning techniques patently violated all principles of child interviews. Dr. Snow clearly manipulated the answers of the child by rewarding the responses relating to abuse and by punishing any denials. Certainly, this video tape should have alerted the state

to her unorthodox practices and yet again nothing was done to prevent her further interviews during several more months.

Finally, the county attorney as well as the police took part in the manipulation of the children. At the December 13 County Attorney meeting, Dr. Snow asked each child his version of the story in the presence of the others. One of the children, Ryan, at the meeting denied anything happened. In a later interview with Dr. Tyler he told her that he felt pressured at the meeting to believe something happened and he did not want to call the other children liars and did not want his family to reject him. Ryan stated that as he was told more and more what had happened he kept remembering more and more. Finally, by the time of his video deposition he remembered that Petitioner had abused him. (Tr. Vol. 5, pp. 222-24).

The actions of Dr. Snow and the

county attorney and police are directly attributable to the state. In addition, Dr. Snow's conduct indirectly influenced the children by causing the parents of the children to unduly pressure them into conforming their stories with the stories of the others. This combination of family pressure, interviewing pressure, group contamination and the lack of any records of what had occurred created a fundamental denial of due process long before the opening day of Petitioner's trial.

The instant case is the type of case referred to by Justice Stevens in his concurring opinion of Youngblood in which he noted that the loss or destruction of evidence is so critical to the defense as to make a criminal trial "fundamentally unfair." 109 S.Ct. 333, 339. A violation of the Youngblood due process standard would have occurred in this case had the state simply refused to record and preserve the critical interviews with the

children. However, this case is one step beyond that failure by the actual active manipulation on the part of Dr. Snow and the county attorney to shape the testimony as it was being developed.

This case can serve as a vehicle for this Court to further develop the standards enunciated in Youngblood. This case can define the troubling concept of "bad faith" and the type of conduct required by the state in order to receive due process protection. Most importantly, it can serve as a mechanism to insure that a defendant accused of child abuse will receive a fair and fundamentally just investigation process and that the state will be sensitive to the inherent and unique problems surrounding a child abuse investigation.

II. THE HEARSAY TESTIMONY OF THE CHILDREN ELICITED THROUGH THE CHILD ABUSE SPECIALIST, THE PARENTS, AND THE POLICE, DID NOT HAVE A PARTICULARIZED GUARANTEE OF TRUSTWORTHINESS AND THEREFORE WAS IMPROPERLY

ADMITTED IN VIOLATION OF THE SIXTH AMENDMENT CONFRONTATION CLAUSE.

The lower court allowed the hearsay statements of the children to be introduced through the testimony of Dr. Snow, Dr. Tyler, two police officers, and six parents. This admission was made pursuant to §76-5-411, U.C.A. which allows a child victim's out-of-court statements regarding sexual abuse as evidence "though it does not qualify under an existing hearsay exception."

This Court has recognized that competing interests, if closely examined, may warrant dispensing with confrontation at trial. Ohio v. Roberts, 448 U.S. 56 (1980). However, where hearsay does not fall within a firmly routed hearsay exception the evidence must be excluded "at least absent a showing of particularized guarantees of trustworthiness." 448 U.S. at 66. Justice Stewart in evaluating the "avalanche" of

hearsay testimony, 119 Utah Adv. Rep. 39-46, specifically evaluated the events in this trial as compared with the statutory requirement. Justice Stewart stated:

> While the trial court made findings under §76-5-411, it did not address the issues of reliability which are raised by undisputed evidence of coersion, suggestion, intimidation, confabulation, and falsehood. Nor did the court take into account relative aspects of developmental psychology. As a matter of law, the findings are utterly inadequate on the facts of this case. [T]he victims' statements related through Barbara Snow and other experts were simply so unreliable that they should not have been admissible.
>
> In sum, the tainting, indeed the inducing of testimony in this case, was not benign--it was the product of a misdirected zealousness and the failure to adhere to any scientific standards for the eliciting of truthful testimony. By itself, that should require a reversal. Id. at 119 Utah Adv. Rep. at 45-46.

In Idaho v. Wright, No. 89-260 the issue as presented in the Petition for Writ of Certiorari is whether the Sixth

Amendment Confrontation Clause requires that the hearsay statements of a young victim of sexual abuse be excluded unless the state establishes that (1) the interview was either audio or video taped; (2) leading questions were not used; and (3) the examining therapist or doctor conducting the interview did not have any preconceived idea of what the child should be disclosing. Here, the testimony of Dr. Snow clearly violated all three of these standards. If this Court adopts a similar standard in determining reliability of children's hearsay evidence then the testimony of Dr. Snow as well as some of the other witnesses would clearly be improper and prejudicial.

It is therefore respectfully submitted that as to this issue of reliability and hearsay that the instant case be consolidated with the Idaho case or that, in the alternative, if certiorari is not granted on any other grounds argued

herein that the case be held in abeyance pending the outcome of the Idaho decision.

III. THE DEFENDANT WAS DENIED FACE-TO-FACE CONFRONTATION WITH THE ACCUSING CHILDREN IN DIRECT VIOLATION OF THE SIXTH AMENDMENT CONFRONTATION CLAUSE.

Coy v. Iowa, 108 S.Ct. 2798 (1988) was decided on June 29, 1988 approximately four months after this case had been submitted to the Utah Supreme Court. In Coy this Court held that a defendant's right of confrontation under the Sixth Amendment was violated when a screen was erected between the complaining witnesses and the defendant at trial.

Justice Stewart in the dissenting opinion extensively reviewed Petitioner's claim of denial of face-to-face confrontation. 119 Utah Adv. Rep. 46-48. He concluded that the lower court's findings pursuant to Utah Code Annotated §77-35-15.5(2)(a) were constitutionally insufficient since in order to exclude a defendant from

confrontation a finding must be made more than simple fear, trauma, stress, or upset to the witness. Justice Stewart noted:

> "Emotional or mental strain is experienced by virtually all witnesses, both adults and children, and is not by itself a constitutionally acceptable excuse for dispensing with face-to-face confrontation when a child testifies." 119 Utah Adv. Rep. at 47.

The Utah statute requires a defendant's physical exclusion from a video taping or closed circuit examination of a child if (1) the defendant consents to be excluded; (2) the court determines that the child will suffer serious emotional or mental strain if he is required to testify in the defendant's presence; (3) or that the child's testimony will be inherently unreliable if he is required to testify in the defendant's presence. §77-35-15.5(2)(a).

The Utah statute is even broader in allowing exclusion of a defendant from face-to-face confrontation than is the

Maryland statute which is the subject of review in Maryland v. Craig, No. 89-478. There, a defendant may only be excluded if the court determines that the "child victim will suffer serious emotional distress such that the child cannot reasonably communicate." §9-102(a)(1)(ii), Md. Ann. Code, Cts. and Jud. Proc. Art. (1984 Repl. Vol., 1988 Cum. Supp.).

The instant case provides this Court with alternative criteria to examine in determining whether the Sixth Amendment and the Coy decision permits the exclusion of a defendant from face-to-face confrontation with a child witness. If this Court does not deem the differing language of the two statutes significant in order to accept certiorari and if no other ground argued herein is accepted, then Petitioner would alternatively request that this matter be held in abeyance until a decision has been rendered in the Maryland v. Craig

controversy.

IV. THE UTAH SUPREME COURT IMPROPERLY APPLIED THE STANDARDS FOR DETERMINING INEFFECTIVE COUNSEL AS PROCLAIMED BY THIS COURT IN STRICKLAND V. WASHINGTON AND KIMMELMAN V. MORRISON. BY FAILING TO REQUIRE FACTUAL EVIDENCE OF COUNSEL'S CONDUCT.

It is submitted that the majority of the Utah Supreme Court lacked any factual basis upon which to conclude that conscious strategy had occurred. This Court's prior decisions, therefore, require at the minimum a remand for a factual inquiry. This contention will now be discussed.

On appeal the majority opinion noted that Petitioner claimed he was denied effective assistance of counsel because trial counsel:

(1) failed to raise the due process challenge to the admissibility of the state's evidence of child sexual abuse;

(2) failed to challenge the admissibility of the state's evidence of child sexual abuse;

(3) failed to challenge the

admissibility of the child victims' out-of-court statements;

(4) failed to object to the competency of the children, parents and experts to testify;

(5) failed to object to the "syndrome" evidence;

(6) failed to object to the video taping procedures employed;

(7) failed to object to the expert witness testimony that the children in this case were victims of sexual abuse;and

(8) failed to make an opening statement or file post-trial motions. 119 Utah Adv. Rep. at 35.

The Utah majority relying upon this Court's decision in Strickland v. Washington, 466 U.S. 668 (1984) concluded that none of these claimed errors were reviewable since defense counsel has strategically and consciously taken a course of conduct which could not be raised on appeal.

The dissenting opinion of Justice Stewart vehemently disagreed with this conclusion and stated:

The record does not support

> the majority's latent speculation that the "manifold failure to object" were the "result of a conscious strategy". It stretches credibility beyond the breaking point to argue, as the majority does, that it is reasonable to conclude that defense counsel, an experienced criminal lawyer, consciously chose not to seek the exclusion of the testimony about which defendant now complains. In fact, the precise opposite is true. Competent trial counsel would have made proper objections and attacked the experts' testimony; there was no rational excuse for not objecting to the hearsay. 119 Utah Adv. Rep. 37-38. (Emphasis in original).

In dissenting from the denial of the petition for rehearing Justice Stewart further stated:

> Absolutely nothing was, or could have been, gained by counsel's failure to object. The strategy that the court says counsel pursued could have been equally well pursued had proper objections been made and sustained. 123 Utah Adv. Rep. at 6.

The contentions of Justice Stewart are well supported in the record. On appeal, Petitioner argued that his lower court counsel was ineffective because he

failed to present matters of competency and reliability to the lower court for legal determination and instead relied upon a jury to conclude that the state's evidence was incompetent and unreliable. Once it was discovered how the state's witnesses had been manipulated by unprofessional interviewing techniques, group sessions and other highly prejudicial practices, it was incumbent upon the defense counsel to move the lower court to exclude the state's evidence. This procedure would be analogous to a motion to suppress in an unlawful search in which it is claimed that illegal conduct occurred.

Had this been done the testimony of both Dr. Snow and Dr. Tyler, as well as the parents, could have been excluded or severely limited based upon the unorthodox, unprofessional, and highly prejudicial techniques of Dr. Snow in the interviewing of the children, the failing

to record her sessions, and her conversations with the childrens' parents. Instead, however, trial counsel during the "reliability" hearing required by Utah law made no objections to the testimony of either the expert witnesses or the parents.

Even if the trial court had denied Petitioner's efforts to exclude these witnesses the same procedures actually utilized by the trial counsel could have been followed and the matter still could have gone to the jury as a matter of credibility rather than a matter of evidence admissibility. Thus, the only effect of trial counsel's failure to raise this contention before the lower court was to give the state the opportunity to claim waiver of this critical constitutional argument.

Essentially there was everything to gain and nothing to lose by an effort before trial to exclude the damning

testimony of the experts and the parents. Likewise, the competency of the children's testimony itself should have been attacked on this same basis considering the techniques used by Dr. Snow.

Other conduct of defense counsel was highly prejudicial and could in no sense be considered as a strategy. For example, even though trial counsel specifically objected before trial to any statements of the experts regarding the truthfulness of the children or their opinion as to whether abuse had occurred, counsel nevertheless failed to object to this type of testimony when it was presented at trial even though the lower court had previously ruled such testimony was inadmissible. Had objections been made and preserved Petitioner would have almost certainly been entitled to a new trial based upon the case of State v. Rimmasch, 775 P.2d 388 (Utah 1989) which was decided several months before the instant case.

Rimmasch specifically held that opinion evidence as to the truthfulness of the children and as to abuse based upon syndrome evidence was improper. A number of cases in which objections have been made were subsequently reversed. See State v. Van Matre, 777 P.2d 459 (Utah 1989); State v. Nelson, 777 P.2d 479 (Utah 1989); State v. Bates, 114 Utah Adv. Rep. 28 (Utah 1989); and State v. Ramsey, 119 Utah Adv. Rep. 54 (Utah 1989).

The majority opinion essentially adopted a position that it could objectively, without a factual inquiry, determine the "strategy" of defense counsel in refusing to make the objections argued on appeal. In his Petition for Rehearing before the Utah Supreme Court, Petitioner argued that even if an objective "hypothetical reasonable lawyer" standard was being utilized the first prong of the Strickland case would still have been violated. Petitioner argued

that it is no more unreasonable to expect a competent criminal lawyer to attempt to keep tainted and highly unreliable testimony from a jury than it is to keep illegally seized evidence from a jury. For example, in Kimmelman v. Morrison, 477 U.S. 365 (1986) this Court agreed that the failure of trial counsel to properly investigate his client's case and to timely move to exclude possible illegally seized evidence was ineffective. Here, the failure to attack both reliability and competency as required by Utah law was inexcusable and had no strategic objective whatsoever. This is true, as noted by Justice Stewart (in his dissent from the denial of the Petition for Rehearing) even if defense counsel had consciously decided to make such objection but such decision was outside of the range of professional competent assistance.

Regardless of the arguments that can be addressed as to the hypothetical

competent lawyer the petitioner believes that the position adopted by the Utah Supreme Court is wrong in light of the Strickland decision. Petitioner contends that in cases in which there is a plausible ineffective counsel claim Strickland requires a factual investigation as to what really occurred in the trial below. Here, the Utah Supreme Court dismissed all of the contentions raised by Petitioner on appeal based upon mere speculation as to what the Court believed his defense counsel intended to do. Unlike Kimmelman there was no explanation by Petitioner's lower court counsel to the trial court as to why he chose or did not choose any certain line of conduct. Unlike Strickland and Darden v. Wainwright, 477 U.S. 169 (1986) no evidentiary hearing was held in a habeas corpus proceeding. Instead, the majority opinion was solely based upon what the Utah majority believed the trial

attorney was thinking at the time of his representation. For example, the opinion is replete with expressions such as "it is reasonable to conclude...."; "he might well have thought...."; "having made this decision, counsel could reasonably have concluded...."

As noted by Justice Stewart in his dissent to the Petition for Rehearing:

> At the very least, the Court should have adequate factual support before it refuses to apply the manifest injustice or plain error rule on the grounds that counsel had a "conscious strategy" not to object to evidence that was adduced in violation of the defendant's constitutional rights. The Court's conclusion is supported by nothing but its own surmise and speculation. Indeed, not even the state argues that the record supports the conclusion that counsel had "a conscious strategy" not to object. I submit that such an evidentiary finding is essential before a court can hold that the defendant was not denied the effective assistance of counsel in the face of such fundamental departures from established procedure.

* * *

> I submit that the Court should rehear this case. At a bare minimum, the Court should remand this case to the trial court to take evidence on whether defense counsel pursued a "conscious strategy" not to object to the admission of evidence. 123 Utah Adv. Rep. 6-7.

This Court in Kimmelman recognized the importance of an evidentiary hearing to determine the first prong of the Strickland test. In Strickland this Court acknowledged that factual inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigative decisions just as it may be critical to a proper assessment of counsel's other litigation decisions. 466 U.S. at 691. These decisions presuppose that a factual inquiry is required in determining an ineffective claim in which the threshold of possible professional ineptness has been shown. The Utah Supreme Court majority has essentially doomed Petitioner to a minimum mandatory term of 15 years incarceration

based upon its own speculation as to what tactics defense counsel was employing.

On the other hand, it is submitted that an objective evaluation of the second prong of the Strickland test is proper in determining whether there is a reasonable probability of a different result had effective assistance been offered. In evaluating the second prong a court can as a matter of law determine whether there is a high probability, i.e., a "probability sufficient to undermine confidence in the outcome," that the ineffective assistance would have caused a different result in the outcome of the trial. Here, applying a reasonably objective standard requires a finding that the admission of this highly emotional, unreliable, and yet persuasive testimony could certainly have influenced the jury adversely in convicting Petitioner of these crimes.

It is respectfully requested therefore, that this Court exercise

certiorari in this case as part of its supervisory powers of the state courts to correct the erroneous interpretation of Strickland by the Utah Supreme Court.

CONCLUSION

This case involves a number of critical issues of Due Process, Confrontation and Assistance to Counsel which affect numerous defendants each day in our country's legal system who have been accused of crimes against children.

It is respectfully requested that certiorari be granted to answer these important issues.

Respectfully submitted,

Craig S. Cook

CRAIG S. COOK
(Counsel of Record)
Counsel for Petitioner

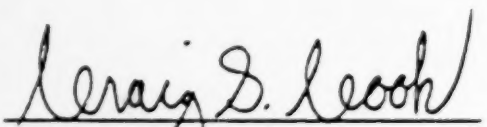
February 20, 1990

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 20th day of February, 1990, three copies of the foregoing Petition for Writ of Certiorari to the Utah Supreme Court were deposited in a United States mailbox, with first-class postage prepaid, addressed to counsel of record for the Respondent:

R. PAUL VAN DAM
Attorney General
DAVID THOMPSON
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

The undersigned further certifies that all parties required to be served have been served.



Craig S. Cook
(Counsel of Record)
3645 East 3100 South
Salt Lake City, Utah 84109
(801) 485-8123
Counsel for Petitioner

APPENDIX

APPLICABLE STATUTES

Amendment 5 to the United States Constitution: No person shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law. . . .

Amendment 6 to the United States Constitution: In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article I, Section 7, Utah State Constitution: No person shall be deprived of life, liberty or property, without due process of law.

Article I, Section 12, Utah State Constitution: In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel.

76-5-410. Child victim of sexual abuse as competent witness.

A child victim of sexual abuse under the age of ten is a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding. The trier of fact shall determine the weight and credibility of the testimony.

76-5-411. Admissibility of out of court statement of child victim of sexual abuse.

(1) Notwithstanding any rule of evidence, a child victim's out of court statement regarding sexual abuse of that child is admissible as evidence though it

does not qualify under an existing hearsay exception, if:

(a) the child is available to testify in court or as provided by Subsection 77-35-15.5(2) or (3).

(b) in the event the child is not available to testify in court or as provided by Subsection 77-35-15.5(2) or (3), there is other corroborative evidence of the abuse; or

(c) the statement qualifes for admission under Subsection 77-35-15.5(1).

(2) Prior to admission of any statement into evidence under this section, the judge shall determine whether the interest of justice will best be served by admission of that statement. In making this determination the judge shall consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, and the reliability of the assertion and of the child.

(3) A statement admitted under this section shall be made availabe to the adverse party sufficiently in advance of the trial or proceeding, to provide him with an opportunity to prepare to meet it.

(4) For purposes of this section, a child is a person under the age of 12 years.

77-35-15.5. Visual recording of statement or testimony of child victim or witness of sexual or physical abuse - Conditions of admissibility.

(1) In any case concerning a charge of child abuse or of a sexual offense against a child, the oral statement of a victim or witness younger than 12 years of age may be recorded prior to the filing of an information or indictment, and upon motion and for good cause shown is admissible as evidence in any court proceeding regarding the offense if all of the following conditions are met:

(a) No attorney for either party is in the child's presence when the statement is recorded.

(b) The recording is visual and aural and is recorded on film or video tape or by other electronic means.

(c) The recording equipment is capable of making an accurate recording, the operator of the equipment is competent, and the recording is accurate and has not been altered.

(d) Each voice in the recording is identified.

(e) The person conducting the interview of the child in the recording is present at the proceeding and is available to testify and be cross-examined by either party.

(f) The defendant and his attorney are provided an opportunity to view the recording before it is shown to the court or jury.

(g) The court views the recording before it is shown to the jury and determines that it is

sufficiently reliable and trustworthy and that the interest of justice will best be served by admission of the statement into evidence.

(h) The child is available to testify and to be cross-examined at trial, either in person or as provided by Subsection (2) or (3), or the court determines that the child is unavailable as a witness to testify at trial under the Utah Rules of Evidence. For purposes of this subsection "unavailable" includes a determination, based on medical or psychological evidence or expert testimony, that the child would suffer serious emotional or mental strain if required to testify at trial.

(2) In any case concerning a charge of child abuse or of a sexual offense against a child, the court may order, upon motion of the prosectuion and for good cause shown, that the testimony of any witness or victim younger than 12 years of age be taken in a room other than the court room, and be televised by closed circuit equipment to be viewed by the jury in the court room. All of the following condtions shall be observed:

(a) Only the presiding judge, attorneys for each party, persons necessary to operate equipment, and a counselor or therapist whose presence contributes to the welfare and emotional well-being of the chid may be with the child during his testimony. The defendant may also be present during the

child's testimony unless he consents to be hidden from the child's view, or the court determines that the child will suffer serious emotional or mental strain if he is required to testify in the defendant's presence, or that the child's testimony will be inherently unreliable if he is required to testify in the defendant's presence. If the court makes that determination, or if the defendant consents:

(i) the defendant may not be present during the child's testimony;

(ii) the court shall ensure that the child cannot hear or see the defendant;

(iii) the court shall advise the child prior to his testimony that the defendant is present at the trial and may listen to the child's testimony;

(iv) the defendant shall be permitted to observe and hear the child's testimony, and the court shall ensure that the defendant has a means of two-way telephonic communication with his attorney during the child's testimony; and

(v) the conditions of a normal court proceeding shall be approximated as nearly as possible.

(b) Only the presiding judge and

attorneys may question the child.

(c) As much as possible, persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror so the child cannot see or hear them.

(d) If the defendant is present with the child during the child's testimony, the court may order that persons operating the closed circuit equipment film both the child and the defendant during the child's testimony, so that the jury may view both the child and the defendant, if that may be arranged without violation of other requirements of Subsection (2).

(3) In any case concerning a charge of child abuse or of a sexual offense against a child, the court may order, upon motion of the prosecution and for good cause shown, that the testimony of any witness or victim younger than 12 years of age be taken outside the court room and recorded. That testimony is admissible as evidence, for viewing in any court proceeding regarding the charges if the provisions of Subsection (2) are observed, in addition to the following provisions:

(a) The recording is both visual and aural and recorded on film or video tape or by other electronic means.

(b) The recording equipment is capable of making an accurate recording, the operating is competent, and the recording is accurate and is not altered.

(c) Each voice on the recording is identified.

(d) Each party is given an opportunity to view the recording before it is shown in the court room.

(4) If the court orders that the testimony of a child be taken under Subsection (2) or (3), the child may not be required to testify in court at any proceeding where the recorded testimony is used.

Rule 403.

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

DECISION REGARDING REHEARING

MINUTE ENTRY

Petition for rehearing having been heretofore considered, and the Court being sufficiently advised in the premises, it is ordered that a rehearing be, and the same is denied.

STEWART, Justice: (Dissenting from the Denial of Petition for Rehearing)

The court denied the defendant's petition for rehearing on November 20, 1989. Although it is unusual for a Justice of this Court to file an opinion dissenting from such a ruling, I deem this case to be of such vital importance in the administration of justice in this state to warrant the filing of this opinion.

The Court's opinion is devoted to explaining why it refuses to invoke the plain error doctrine to decide the defendant's issues on the merits, except for the ineffective assistance of counsel issue, which the opinion does address on

the merits. However, the majority's ruling on the plain error doctrine rests on the same premise as the ruling on the ineffectiveness issue. The common premise underlying both rulings is that defense counsel made a "conscious strategy decision" not to object to testimony that was adduced in violation, I believe, of defendant's right to cross-examine and to confront his accusers face to face.

The defendant's petition for rehearing asserts that there is no evidence that supports the majority's speculation that defense counsels' defaults were the product of a "conscious strategy." The defendant is absolutely correct; there is not an iota of evidence that shows that counsels' decisions not to object were made as the result of a "conscious strategy" rather than inadvertence, mistake, or negligence.

At the very least, the Court should have adequate factual support before it

refuses to apply the manifest injustice or plain error rule on the ground that counsel had a "conscious strategy" not to object to evidence that was adduced in violation of the defendant's constitutional rights. The Court's conclusion is supported by nothing but its own surmise and speculation. Indeed, not even the State argues that the record supports the conclusion that counsel had a "conscious strategy" not to object. I submit that such an evidentiary finding is essential before a court can hold that the defendant was not denied the effective assistance of counsel in the face of such fundamental departures from established procedure.

Even if the record did show that the failure to object was a "conscious strategy," that does not dispose of the defendant's argument that he was denied the effective assistance of counsel. Ineffective assistance of counsel is not

made constitutionally tolerable simply because counsel's conduct was intentional instead of merely negligent, unless the conduct was intended to invite error, which is clearly not the case here. Absolutely nothing was, or could have been, gained by counsels' failure to object. The strategy that the Court says counsel pursued could have been equally well pursued had proper objections been made and sustained.

In all events, the law is that unreasonable trial strategy can constitute ineffective assistance of counsel, even when it is conscious or deliberate, if the strategy falls below an objective standard of reasonable professional judgment. Martin v. Rose, 744 F.2d 1245, 1249 (6th Cir. 1984) ("[E]ven deliberate trial tactics may constitution ineffective assistance of counsel if they fall 'outside the wide range of professionally competent assistance.'") (quoting

Strickland v. Washington, 466 U.S. 668, 690 (1984); Crisp v. Duckworth, 743 F.2d 580, 584 (7th Cir. 1984) (an attorney whose performance is deficient "should not be allowed automatically to defend his omission simply by raising the shield of 'trial strategy'...."), cert. denied, 469 U.S. 1226 (1985); United States v. DeCoster, 487 F.2d 1197, 1201 (D.C. Cir. 1973) (an appellate court should not "second guess strategic and tactical choices made by trial counsel. However when counsel's choices are uninformed because of inadequate preparation, a defendant is denied the effective assistance of counsel" (footnotes ommitted)); see also Kimmelman v. Morrison, 477 U.S. 365, 383-87 (1986) (ignorance of law and inadequate preparation can constitute deficient performance despite "creditable" trial performance); Strickland v. Washington, 466 U.S. 668, 690-91 (1984) ("[S]trategic

choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on invesigation."); Montgomery v. Petersen, 846 F.2d 407, 412-14 (7th Cir. 1988) (counsel's inadvertence based on the attorney's disbelief of the defendant undermined the judgment upon which strategic choices were based). The failure of trial counsel to object to constitutionally defective evidence constituted deficient performance that severely prejudiced the defendant. Because of this, the defendant was denied the effective assistance of counsel.

I submit that the Court should rehear this case. At a bare minimum, the Court should remand this case to the trial court to take evidence on whether defense counsel pursued a "conscious strategy" not to object to the admission of evidence.

Howe, Associate Chief Justice, would

grant a rehearing.

EXCERPT REGARDING CHILD TESTIMONY

In order to facilitate an examination of this Appendix Defendant will briefly review these authorities and the conclusions they have reached. The following authorities are contained in the Appendix:

1. "The Role of the Psychologist in the Assessment of Cases of Alleged Sexual Abuse of Children," Institute for Psychological Therapy, Minneapolis, Minnesota presented in Washington, D.C. in August, 1986. This authority states the following:

> (a) The first interrogation of a child is extremely important in understanding the nature and reliability of statements a child is reported to have made. The younger and more suggestile the child is, the greater the significance and effect of this first interrogation. It will set the direction and scope for all future contacts with the child. It is often the least-documented and the most likely distorted of the succession of interrogatories. (Id. at 27).

(b) In each exposure to interrogation the child learns more about what the interrogator expects. The child learns what adults, including parents, want and expect from the child. The child learns what to say or to do that will get a reinforcing response from the interrogator. The child learns what attitude is expected towards the alleged abuser. The child learns the victim role. The child learns the tale and, by repetition, may come to experience the subjective reality that it happened, even when it never did happen. (Id. at 28).

(c) These procedures contaminate, confuse, and lower the reliability of statements made by children. The younger the child the more powerful the teaching and learning experience. When there is no corroborating data or no admission from the alleged perpetrator, children's statements standing alone must be viewed with great caution. Persons interrogating children seldom show any awareness of their own stimulus value or of the impact of their procedures as a learning experience upon the children and the reliability of statements made by them. (Id. at 29).

(d) Douglas Beshrov, the former director of the National Center on Child Abuse and Neglect, states that 65% of all reports of suspected child abuse are unfounded. This determination,

involving about 750,000 children each year, is made after abuse has been reported and a child protection agency does an investigation. (Id. at 31).

(e) It has become a dogma because sexual abuse intervention professionals claim that "children never lie about sexual abuse." These mental health professionals claim that chidren never make up the kinds of explicit sexual behavior they describe in interviews. There is no emperical evidence to support this claim. There have been no controlled studies to test it. Even if it could be established that children almost never make up stories about being sexually abused, this does not mean they are immune from influence when they are repeatedly interviewed by a series of persons who already believe that abuse has taken place. Children who are influenced by this process to talk about abuse cannot be said to have "made up" a false accusation. (Id. at 33).

(f) Few children, indeed, are likely to have either the competence or the balefulness to embark upon such a course, although some adolescents may do so. Rather, given the plastic and malleable nature of children the question is what degree, kind, and type of influence has been exerted upon them. Again, it does not necessarily require a deliberate and malicious intent on the part of an adult to trigger the kind

of influence that will result in shaping, molding, and essentially teaching a child to produce a tale that is false. The fabrication of a false allegation can result from intent to do good coupled with a preconceived idea of what has happened, a lack of awareness of the susceptibility of children to influence, and a lack of understanding of the stimulus value of adults. (Id. at 33-34).

(g) When a false allegation is attended to and reinforced, and repeated several times to different people, the initially fabricated event may become subjectively real for the person telling it. The child then reaches a subjective level of certainty with the story that makes it extremely difficult to sort out. The child may show all the signs of certainty and appropriate emotions as if it were a true tale. Even if the tale is later recanted, the recanted testimony may not be believed because of the widespread (unfounded) belief that a child would not make a false accusation about sexual abuse. (Id. at 35).

(h) The predominant attitude in the general public is hostile, rejecting, and punitive toward persons accused of sexual abuse of children. The presumption is that the accused is guilty because everybody knows that children cannot lie about sexual abuse. Such widespread and

prevalent negative attitude towards accused persons suggests that the possibility of a fair trial is less for persons accused of sexual abuse than for persons accused of other crimes. (Id. at 36).

2. "Problems in Evaluating Interviews of Children in Sexual Abuse Cases," by David C. Raskin and John C. Yuille for inclusion in a book entitled New Prospectives on the Child Witness. (1988 - in preparation). These authorities state:

(a) Child witnesses do not always appear to have been rehearsed, and testimony based on such procedures might cause investigators, prosecutors, and jurors to make errors of uncritically accepting the child's statements. A therapist reported that one child had already been interviewed by nine individuals, and a mother of another child indicated that her child had been interviewed between 30 and 50 times. Furthermore, interviews were frequently undocumented in any form, and there were instances of children being informed of what had been said by other witnesses and then being asked to report on abuse they had seen performed by those accused by the other witnesses. Children

were even interviewed together, housed in the same motels, given their meals together, and allowed to interact frequently. (Id. at 3-4).

(b) The high incidence of sexual abuse of children combined with the growing number of unsubstantiated and fictitious reports are compelling arguments for minimizing the number of interviews of suspected child victims by using carefully structured interviews as early as possible in the investigative process. Interviews should be conducted by trained and skilled professionals who understand that their role is to obtain maximally reliable information in order to draw a conclusion concerning the validity of the allegations. Any therapy which is deemed necessary should be undertaken only after the investigation with the child has been substantially completed. Therapy should be conducted by a different professional whose role is to treat the problem in the context of the incident, whether or not the allegations turn out to be true. (Id. at 4).

(c) Providing testimony may have profound effects on the child's life. A disclosure of sexual abuse may lead to the breakup of the family, a change in the financial status of the family or placement in a foster home. In contrast, research studies designed to investigate child witnessing abilities have none

of these associated features. These differences between the laboratory research context and those of actual crime situations place severe limitations on the conclusions that may be drawn from the published literature. (Id. at 7).

(d) Typically a child victim of abuse is repeatedly interviewed by concerned parents, police, social workers, lawyers, and others. The younger the child, the more such repeated questioning may contaminate the child's testimony. (Id. at 8).

(e) It is also important to consider the possibility that the basic allegations are true, but the child has named the wrong perpetrator. Many cases occur in which the child has been abused but is afraid to name the actual perpetrator. An example would be a situation where the child is living with her mother and stepfather. The stepfather is abusing the child, but the child names her biological father, whom she does not fear. Under those circumstances, the statement may be rated high in validity because all of the descriptions of acts and events are plausible except the identity of the perpetrator. (Id. at 17).

3. "Faulty Assessment of Child Sexual Abuse: Legal and Emotional Ramifications," by Diane Schetky and

Harold Boverman presented in Albuquerque, New Mexico October, 1985. This article notes:

(a) The legal criteria for competency do not take into consideration a child's ability to distinguish fact from fantasy, ability to cooperate and withstand cross examination nor the child's suggestibility and loyalty conflicts, all of which will affect his testimony and demeanor in the courtroom. (Id. at 8).

(b) It has been demonstrated that the presence of leading questions increases the likelihood that subjects will give answers consistent with misleading information after a two-week delay and that children are more susceptible to misleading information than adults. Further, the ability to understand abstract concepts of right and wrong and truth and falsehood does not preclude the child from lying in face of emotional conflict (shame, fear, loyalty conflicts) nor does it mean the child can distinguish objective truths from subjective interpretations. (Id. at 8-9).

(c) The child may view repeated interviews as a demand for more or different information and feel that the interviewer is not satisfied. Or if the allegations are false but repeated enough, the child may come to believe them, especially

if they result in approval from adults. (Id. at 11).

4. "The Testimony of Child Witnesses: Fact, Fantasy and the Influence of Pretrial Interviews," 62 Wash. Law Rev. 705 (1987) by John R. Christiansen. This author states the following concerns:

(a) The use of new techniques for child witness interviewing and trial preparation poses a new set of problems for the criminal law system, a system organized around the paramount value of reliability. A guiding principle of American criminal justice is that no one shall be branded and penalized as a criminal in the absence of demonstrably reliable evidence. This principle is jeopardized if convictions turn upon statements or testimony from children whose memories have been falsified by suggestion in the course of interviews and pretrial preparations. (Id. at 707).

(b) Ques used to trigger recall may also contaminate the contents of the memories recalled. Younger children who lack the skills to recall memories will often accept and take advantage of memorization and recall strategies adults suggest to them. At the same time, younger children are more susceptible to suggestion concerning the details of what they recall. (Id. at 709).

(c) Young children may have considerable difficulty distinguishing memories of things they themselves have actually said or done from memories of things they have only imagined themselves saying or doing. It follows that there is a a fairly low risk that children will confuse different events or take an interviewer's words as ones they themselves have spoken. However, there may be a substantial danger that, if an interviewer's words or procedures move the child to imagine some event or some of its details, the child will thereafter accept the fantasy as a memory. (Id. at 710).

(d) An interview session can be a learning session rather than a recall session. The child learns that his mother or father wants something from him and he tries to figure out what they are after. By getting a positive action when he says some things and a negative reaction when he says other things he can determine what they want him to say and what will make them happy. The child may even determine that they want him to tell a certain kind of story, and he invents one. They love him for it. At the next interview, it will not take as long for the child to learn. (Id. at 712-13).